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October 21, 2010

Mr. Stephen Tzhone, Remedial Project Manager
U.S. Environmental Protection Agency, Region 6
Superfund Division (6SF-RA)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Via Certified Mail

Ms. Barbara A. Nann, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 6
Superfund Division (6RC-S)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Via Certified Mail

Re: Response Regarding Sampling of Southern Impoundment
San Jacinto River Waste Pits Superfund Site, Harris County, Texas
Unilateral Administrative Order, CERCLA Docket No. 06-03-10 ("UAO")

Dear Stephen and Barbara,

This letter is being submitted on behalf of McGinnes Industrial Maintenance Corporation ("MIMC") in response to (i) the October 8, 2010 letter from the U.S. Environmental Protection Agency ("EPA") to the undersigned responding to the September 10, 2010 letter written on behalf of MIMC regarding the sampling of a waste pit south of I-10 ("South Impoundment"), and (ii) the October 7, 2010 letter from EPA Region 6 to Dr. David Keith regarding notification of alleged non-compliance with the above-referenced UAO. The alleged non-compliance relates to the failure of MIMC and International Paper Company ("IP") to incorporate comment number four of EPA's August 26, 2010 comments into the Remedial Investigation/Feasibility Study ("RI/FS") Work Plan ("WP"). EPA's comment number four also related to the performance of surface and subsurface sampling of the South Impoundment.

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The UAO was sent to MIMC and IP (collectively referred to as the "Respondents") pursuant to a letter dated November 20, 2009 and became effective on the same date. The UAO requires the Respondents to conduct an RI/FS for the above-referenced Site. Under Section IX of the UAO, the "Site" is defined as:

> "the San Jacinto Waste Pits Superfund Site located in Pasadena, Harris County, Texas, encompassing approximately 20.6 acres, partially submerged, tract of land bounded on the south by Interstate Highway 10, on the east by the San Jacinto River main channel, and on the north and west by shallow water off the River's main channel and depicted generally on the map attached as Appendix B."

Paragraph 53 of the UAO describes the work required to be conducted by the Respondents. Specifically, the "Remedial Investigation" and the "Feasibility Study" are defined as follows:

> The Remedial Investigation ("RI") shall consist of collecting data to characterize site conditions, determining the nature and extent of the contamination at or from the Site, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. (emphasis added).
>
> The Feasibility Study ("FS") shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site. (emphasis added).

Thus, the work required to be conducted by the Respondents under the UAO consists of an investigation of the conditions at the Site, as defined in the UAO, and those areas contaminated by hazardous substances, pollutants or contaminants from the Site.

Subject to certain defenses, Respondents notified EPA of their intent to comply with the UAO and have proceeded in good faith to do so. The recent directive from EPA, however, to conduct a surface and subsurface investigation of the South Impoundment is beyond the scope of the UAO and appears to be based on a faulty legal premise.

Based on our discussions with IP representatives and IP's October 18, 2010 letter regarding this subject, IP has stated that it is willing to conduct the South Impoundment investigation. This is not surprising given that (i) IP is legally responsible for the waste disposal practices of Champion Paper Company and (ii) Champion used the South Impoundment for the disposal of its wastes. The same clarity that exists relative to IP's responsibility for the South Impoundment does not exist with respect to MIMC's involvement with this impoundment. Therefore, as stated in MIMC's September 10, 2010 letter, MIMC respectfully declines to participate in this investigation. The reasons for this are more fully set out below.

Even though MIMC will not participate in the investigation of the South Impoundment, the language that EPA has directed the Respondents to include in the RI/FS WP pursuant to its comment number four is being added to the WP and a revised WP is being submitted to EPA by the Respondents' Project Coordinator. The inclusion of this language in the WP does not constitute an admission by MIMC that the investigation of the South Impoundment is within the scope of the RI/FS required by the UAO. To the contrary, for the reasons stated in this letter, MIMC continues to maintain that this investigation is not covered by the UAO and that MIMC has no responsibility for the South Impoundment.

I. An Investigation of the South Impoundment is not covered by the UAO.

As previously noted in various letters, phone calls, and emails between MIMC and EPA Region 6, MIMC asserts that the South Impoundment is separate from and unrelated to the "Site," as defined in the UAO. The definition of "Site" is contained in Section IX of the UAO and is set out above. This definition provides that the Site is bounded on the South by I-10. Paragraph 7 of the UAO further provides that the Site includes the 20 acre tract of land located north of I-10 (referred to herein as the "Tract") where certain hazardous substances were disposed of, "as well as wherever those hazardous substances have been deposited, placed, or otherwise come to be located." This definition is consistent with the scope of the Remedial Investigation and the Feasibility Study described in Paragraph 53 of the UAO (as set out above), both of which require the Respondents to address "contamination" or "hazardous substances, pollutants or contaminants" at or from the Site.

In previous correspondence, MIMC has noted that no evidence currently exists demonstrating that the hazardous substances from the Tract have been "deposited, placed, or otherwise come to be located" at the South Impoundment. To the contrary, the sampling data resulting from the soil sampling conducted by the Respondents on the Texas Department of Transportation ("TxDOT") right of way ("ROW") that separates the Tract from the area south of I-10 where the South Impoundment is located, tend to show that the wastes from the Tract have not impacted the area where the South Impoundment appears to be located. (These data are discussed in more detail below.)

Additionally, the May 1966 Texas Department of Health report (the "TDH Report") regarding the waste disposal operations of Champion Paper Company's Pasadena Paper Mill suggests that wastes that may be found at the South Impoundment, if any, would be the result of waste disposal operations conducted by Champion Paper Company and the Ole Peterson Construction Company ("Ole Peterson"). Ole Peterson is wholly unrelated to MIMC, and the operations by Champion and Ole Peterson south of I-10 were unrelated to the operations of MIMC at the Tract, which is the subject of the UAO and RI/FS. As stated in the TDH Report: "The older site [referring to the South Impoundment] was used prior to McGinnes Corp taking over the operation and appears to consist of a pond covering between 15 and 20 acres. The new (and present) site [referring to the Tract] consists of an estimated 20+ acres, of which slightly

less than 15 are being used. This area contains two ponds." TDH Report at page 2. A copy of the TDH Report is attached hereto as **Exhibit 1** and incorporated herein by reference.

In addition to the express language of the UAO itself, recent case law suggests that it is appropriate to consider two separate tracts of property as separate "facilities" under CERCLA where the properties have different owners and are reasonably or naturally divided into multiple parts or functional units. In *U.S. v. Washington State Department of Transportation*, WL 2698854 (W.D. Wash., July 7, 2010) ("*WSDOT*"), the court analyzed the scope of the word "facility" under CERCLA. The term "facility" is used instead of "site" in CERCLA and is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). A copy of the *WSDOT* case is attached hereto as **Exhibit 2** for your convenience.

Of particular relevance and importance to this matter, the court noted that "CERCLA was not intended to place the cost of the clean up on persons who are not responsible for the contamination." *Id.* at *5. In this case, since MIMC had no known involvement in the disposal of Champion waste in the South Impoundment, the efforts by EPA to include this area in the Site subject to the UAO and require MIMC to incur the cost of investigating this area runs counter to the intent of CERCLA.

The court also noted that even though two properties could be considered "facilities" under CERCLA since hazardous substances are located on both properties, "that does not mean the two sites combine into one site to form a single facility." *Id.* This is also particularly relevant to this case as EPA appears to be directing that the South Impoundment be investigated under the UAO merely on the basis that hazardous substances (i.e., Champion wastes) are located on both properties.

In *WSDOT*, the court found that the area which the U.S. wanted to designate as a single Superfund site included properties of several different owners and that there appeared to be no common purpose among the different owners. The court further noted that the properties in question were reasonably or naturally divided into multiple parts or functional units. As such, the court found that the properties in question should be considered separate facilities. *See id.*

As noted in our previous conversations with EPA Region 6, it is undisputed that the Tract and the South Impoundment are owned by different persons or entities. Additionally, the TDH Report states that the Tract and the South Impoundment were each operated by separate and unrelated operators—the South Impoundment by Ole Peterson and the Tract by MIMC. There is no evidence that the owners and/or operators of the Tract and the South Impoundment ever shared a common purpose. They appear to have been separately owned and operated at different points in time, with the only commonality being that Champion waste was disposed of in each. Furthermore, because the TxDOT ROW and I-10 separate the two locations, the Tract and the South Impoundment location are reasonably and naturally divided into separate areas. Therefore, based on these facts, the definition of the "Site" in the UAO, and the court's holding in *WSDOT*,

the South Impoundment area is a separate facility from the Tract. Therefore, EPA's direction to MIMC and IP to investigate the South Impoundment under the existing UAO is ultra vives, arbitrary and capricious.

While MIMC has acknowledged that it requested authorization to discharge water from the South Impoundment in 1966, MIMC has not found any evidence that it actually conducted any discharge or other activities at the South Impoundment. MIMC has requested, and it again respectfully requests, that EPA Region 6 reveal to MIMC any evidence that it may have to demonstrate operation of the South Impoundment by MIMC. Moreover, in light of the October 18, 2010 letter from IP's counsel to EPA regarding this subject, MIMC respectfully urges EPA to send another CERCLA Section 104(e) request for information to IP requesting copies of all documents upon which IP's counsel bases his statement that "there is a basis for requiring MIMC to also perform the South Pit investigation under the UAO, given (among other things) the historical information that suggests that MIMC was involved in managing [sic.] area known as the 'south pit' . . .".

II. Validated sampling data confirm the information previously submitted to EPA regarding the apparent lack of connection between the Site and the South Impoundment.

In a September 3, 2010 letter sent to EPA Region 6 by Anchor QEA on behalf of the Respondents, Anchor cited to various data, including certain preliminary dioxin data from sampling at the TxDOT ROW north of the South Impoundment, to suggest that no releases or threatened releases from the South Impoundment have occurred. Moreover, as stated in the September 10, 2010 letter from Winstead PC to EPA Region 6 on behalf of MIMC, such data also suggests that waste constituents from the 20.6 acre Tract, on which the waste impoundments that are the subject of the UAO and associated RI/FS are located, have not migrated from the Tract, across the TxDOT ROW, to the South Impoundment.

Recently, Respondents submitted to EPA the final validated data from the soil sampling of the TxDOT ROW. The validated dioxin data are virtually identical to the preliminary data noted in the September 3 and September 10 letters discussed above, the one difference being the 2, 3, 7, 8 TCDD result for Sample Location TxDOT 010 which dropped to 5.37 ng/kg dw. A figure showing the locations of the soil samples and the final validated 2, 3, 7, 8 TCDD test results is attached hereto as **Exhibit 3** and incorporated herein by reference.

The new, validated data reveal the possible presence of some 2, 3, 7, 8 TCDD from the Tract at low concentrations, on the portion of the TxDOT ROW located north of I-10, particularly in Sample Nos. TxDOT 003, TxDOT 004 and TxDOT 005. The results for the samples taken from the TxDOT ROW south of I-10, however, revealed primarily background levels of dioxin. Sample No. TxDOT 010 showed an extremely low concentration of 2, 3, 7, 8 TCDD that may be associated with the impoundments on the Tract. The location of this sample is immediately south of the Tract whereas the location of the South Impoundment, based on the drawing of the impoundment contained in the TDH Report, is southwest of the Tract and close to

the Old River. The sample result for TxDOT 009, the sample location closest to the South Impoundment, was 0.55 J ng/kg dw, the "J"-flag denoting that the 2, 3, 7, 8 TCDD value is so low that the laboratory could not guarantee the value reported. Thus, the available sampling data do not support the notion that hazardous substances have migrated from the Tract impoundments to the area of the South Impoundment.

III. The disposal of Champion waste in the South Impoundment does not mean that the South Impoundment is part of the Site.

The October 7, 2010 notice of deficiency states that the Respondents are in noncompliance with the UAO because they did not incorporate EPA's comment number four into the RI/FS WP. Comment four provides as follows:

> "(4) Add new section and language specified:
>
> 6.1.8 Soil Investigation
>
> USEPA has information that indicates an additional impoundment is located south of I-10. This information indicates the additional impoundment contains material similar to that disposed of in the two impoundments located north of I-10. Surface and subsurface soil samples will be taken in and around these impoundments to determine the nature and extent of any actual or threatened releases."

EPA's comment appears to be based on the false premise that because Champion waste was placed in both the Site impoundments and the South Impoundment, they are both part of the same Site under the UAO. This interpretation of the UAO ignores the express definition of "Site" in the UAO and potentially subjects MIMC to expansive liability for any area where "material similar to that disposed of in the two impoundments located north of I-10" may be disposed of. MIMC cannot be responsible for every Champion Pasadena Paper Mill sludge disposal location that has been constructed or used since the mill's inception in 1937. Moreover, under the existing UAO (as explained above), MIMC is only responsible for conducting an RI/FS with respect to the Champion waste disposed of at the Tract, including areas where that waste has come to be located. MIMC is committed to conducting an investigation consistent with EPA guidance that addresses areas where this waste is located. In contrast, however, EPA's comment four directs a surface and subsurface investigation of the South Impoundment based merely on the fact that "similar" material is located there. This is beyond the scope of the UAO.

It is MIMC's desire to continue to work with EPA in completing the requirements of the UAO in a fair manner. In that regard, MIMC remains committed to investigating the Tract and defining the extent of contamination resulting from the wastes disposed of at that location. Based on the information that we have reviewed, it appears clear that MIMC was not involved in any waste disposal operations at the South Impoundment and therefore should not be asked by

EPA to incur the additional costs associated with conducting a surface and subsurface investigation of that impoundment. If you have any questions or comments, please feel free to contact me at 512-370-2806.

Very truly yours,

Albert R. Axe, Jr.

AA:jtf
Enclosures

cc: John Cermak
David Keith

EXHIBIT 1

STATE DEPARTMENT OF HEALTH

AUSTIN TEXAS

INTER-OFFICE

FROM Stanley W. Thompson, P.E. Regional Engineer

TO B.F. Smithhorst, P.E., Director Division of Water Pollution Control

SUBJECT Investigation of Industrial Waste Disposal - Champion Paper, Inc., Pasadena

Following a request from Hugh Yantis, Assistant Executive Secretary of the Water Pollution Control Board, the writer and Sanitarian John Kidd contacted officials of the Champion Paper, Inc., Pasadena, Texas, and made an investigation of the present waste disposal practices of the company. This investigation was made on April 22, 1966.

Persons contacted during the course of the investigation included:

Mr. J.L. Henderson	- Champion Paper	
Mr. A.J. Navarre	- " "	
Mr. V.C. McGinnes	- McGinnes Industrial Maint. Corp.	
Mr. George Laurie	- " " " "	(Secry-Treas)
A.E. Kimball	- " " " "	(Gen. Manager

The mailing addresses of the companys are:

Champion Papers, Inc., P.O. Box 872, Pasadena, Texas 77501

McGinnes Ind. Maint. Corp., 201 N. Richey, Pasadena, Tex 77502

In addition to the above, Sanitarian Bob Douglass of the Harris County Health Department, Air and Stream Pollution Section, was contacted in the absence of Dr. W.A. Quebedeaux, Chief of the Section. Mr. Douglass was unable to assist in the inspection.

General

The investigation covered the present practice of disposal of settled solids from the Champion Paper processes, a practice which is carried out by the McGinnes Ind. Maint. Corp. This practice consists of the removal of the settled material from the secondary ponds at Champion plant, the transporting of the material by barge to an area adjacent to the San Jacinto River (Near Hwy 73), and the unloading from the barge into ponds which have been formed by levees. This operation has been carried out since approximately 3 years ago with the first operation begin in June of 1965. This work was done by the Ollie Peterson Construction Co., with the McGinnes Corp. taking over and beginning operation on September 13, 1965.

This particular type of operation is carried out in a cycle of sorts. The ponds at Champion are allowed to fill with the material (or one full and the other approaching it) and hauling is then begin on the full pit. At the time of the inspection, both pits had been cleaned with about 5 barge loads (est. by Mr. McGinnes) left to remove. This would complete the operation until the ponds are again full - which is expected to be sometime later this year.

SIGNED

Quality of Material Removed

An analysis of the material was not available, but officials of Champion indicated that the material was neutral in pH, non-toxic, and primarily fibrous. The dried material resembled a cheaper grade of cardboard - such as used in egg cartons, etc. Mr. McGinnes reported that he had used it successfully for matting for his equipment in the disposal site.

The material appears to solidify rapidly and Mr. Henderson reported that a vertical wall can be cut in the ponds while removing it and that the wall will stand. It was also reported that after the material has set a short time, that water will not penetrate it - that rain water will stand over it. It was further reported that grass can be started on the dry material and that it will spread rapidly, thus further cutting off water.

The material is removed by use of jetting (using waste water from the third set of ponds) and is reported to be removed with a solid content of 25% to 30%.

Quantity of Material

It was estimated by Mr. Henderson that complete cleaning of the two ponds would result in removal of about 135,000 cubic yards of the material. The barges used in the operation will hold about 1000 yards and three barges are used. This allows one barge to be in the process of being filled, one to be in the process of being unloaded, and one to be in transit. About 6 hours is required for for the complete operation. Two shifts have been in operation to allow an average of 6 barge loads per day to be hauled.

Mr. Henderson stated that the material was accumulating at Champion at an estimated rate of 1 barge load per day.

Disposal Site

As mentioned, the disposal site is adjacent to the San Jacinto River at the Hwy 73 Bridge with the older site on the south side of the Highway and the newer site on the North side. The older site was used prior to McGinnes Corp taking over the operation and appears to consist of a pond covering between 15 and 20 acres. The new (and present) site consists of an estimated 20+ acres, of which slightly less than 15 are being used. This area contains two ponds.

One of the ponds has been filled and the second is nearly full. Levees on the first pond appear to be in good shape, with possibly slight seepage, while the second pond needs additional work on the levees. According to Mr. McGinnes, wet weather has prohibited the proper completion of the levees and additional work is to be done as soon as possible.

The two new ponds are connected with a drain line to allow the flow of excess water (including rain water) from pond #1 to pond #2, where it collects near the barge unloading area. At the present time, this water is pumped back into the barges and returned to the Champion Paper plant where it is passed through the last settling ponds and discharged to the Channel with the rest of the plant effluent. This particular operation will be mentioned later in the report.

Danger to River

According to available information, the river is not subject to flooding which might wash out the levees - that is, subject to flooding from rainfall without the aid of a storm such as Carla. In that event, the disposal area might well be covered with water.

It also appears that the material will solidify after being in the ponds a short time and there would be no danger of pollution from seepage. The only water is that which does separate from the solid material and rainfall.

Excess Water & Its Disposal

At the present time, the excess water plus rainfall which collectes in the pond area is pumped into the barges and is carried back to Champion Paper and discharged through the final settling ponds. According to Mr. Henderson and Mr. Robinson, this operation is not economical and they are very interested in finding out if the water could be discharged into the River at the disposal site. The main though in the removal of water being that the solidification of the material and the draining of the top water would allow the discharge of more wastes to the area.

An example of this is the older area (South of the Hwy), where the water ranges from 3 - 5 feet deep. Mr. Kimball had a minnow bucket type of container submerged in this water with fish in it and reported that they had been there for several weeks. These fish (or minnows) were in good condition.

Quality of Excess Water

Samples were collected of the water in the various pits and submitted to the Austin State Dept of Health Laboratory for analysis. The samples and their results are as follows:

Point of coll	pH	BOD	Sulphates	Chlorides	S.S	D.O.	Colo
#1 - New Pond #2 - near pt of return to Barge	7.8	1590	5	790	213	0	220
#2 - New Pond #1	7.4	> 2,500	31	470	524	0	110
#3 - San Jacinto River - near barging pt	7.3	2.5	78	465	36	4.4	
#4 - Old Pond - South of Hwy 73	8.3	8.0	50	2060	20	2.2	110

In general appearance, samples #1 and #2 were very dark with #4 somewhat lighter. The water from the older pond (Sample #4) had been undisturbed for some 6 to 7 months.

Officials of both companies were most anxious to work something out regarding this method of waste disposal. It appears that several things are to be considered in the matter.

1. The type of waste involved is not easy to get rid of, there is a large amount of the waste, and there will be an even larger amount in the future. This larger amount will be due to the new, and more efficient, waste treatment equipment that is to be provided by Champion Paper.

2. Very large tracts of land would be required for extended operation of this type, and this land would need to be accessible to barges - so on major rivers or streams. Apparently, the company officials feel that they can return to the areas after a period of time and deposit additional material. This would be necessary to get the full benefit from the land.

3. There is no market for such material for use as fill material.

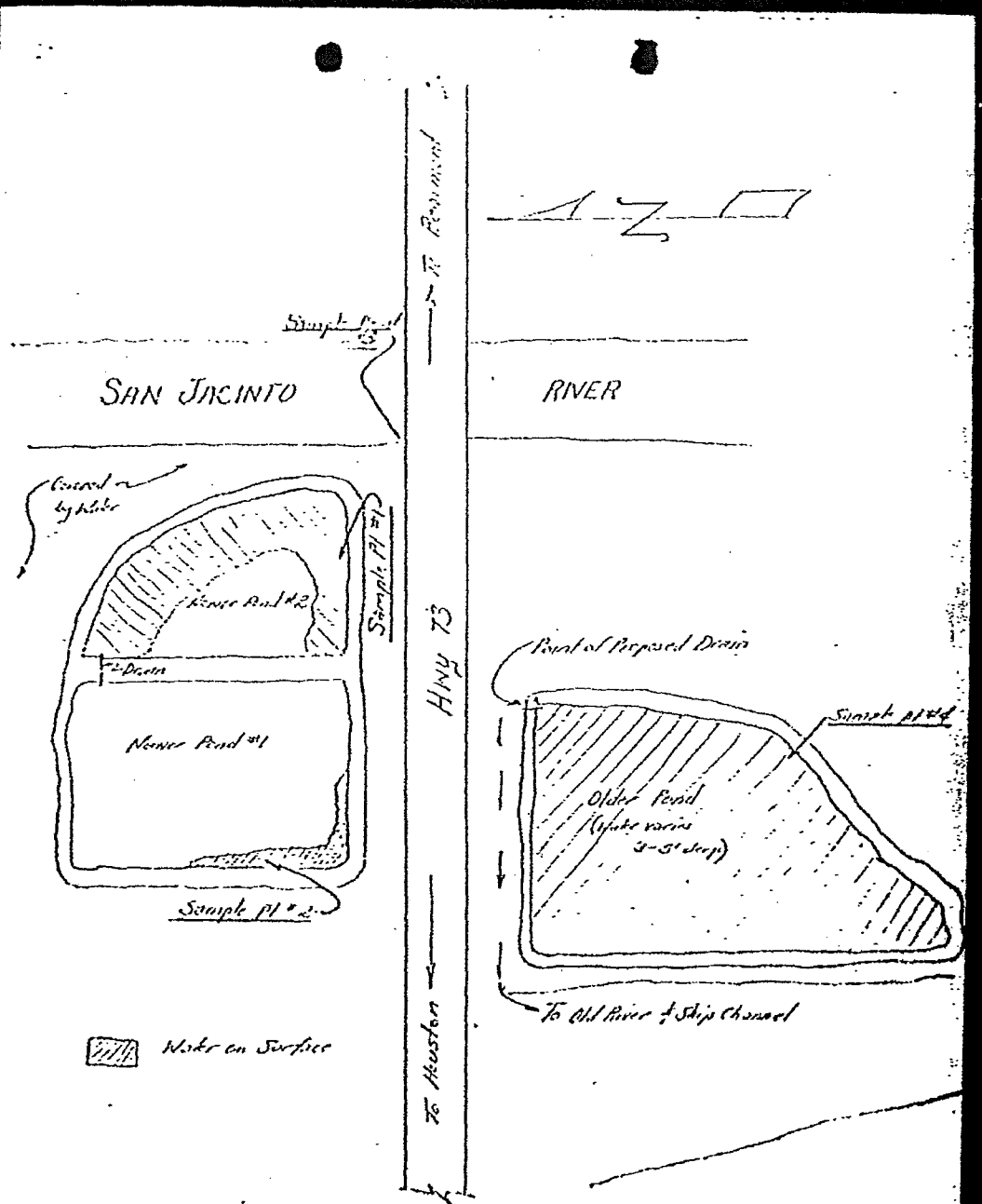
4. It also appears that continued operation would depend on the ability to return the water off the ponds to the adjacent stream rather than return it to the plant.

The operation and the need for submitting an application for a permit from the WPCB was discussed with Mr. Henderson and Mr. McGinnes, and it is understood that such a permit would be obtained by Mr. McGinnes rather than by Champion. There is apparently the thought, or plan, that Mr. McGinnes would obtain the permit and handle the wastes from Champion under contract (the present set-up) and then also take care of such other industrial wastes that he might be able to handle (not from Champion).

It is the writer's understanding that nothing was to be done in the way of a permit application until the results of the sample analyses were received. At that time, the company officials would get in touch with the WPCB and its staff to discuss the matter further and get the thinking of the Board in light of the sample results. By that time, the companies should also have information regarding the chemical content of the material. It was felt that this would be the best approach to the matter since the present cycle of operation was essentially completed and time would be available to either obtain a permit for the operation - or work out a different method of disposal- prior to the need for renewed removal of the waste material.

Respectfully submitted,

Stanley W. Thompson, P.E.
May 6, 1966



DISPOSAL AREA

WASTE FROM CHAMPION PAPER, INC

EXHIBIT 2

U.S. v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION (W.D.Wash. 7-7-2010)

UNITED STATES OF AMERICA, Plaintiff and Counterclaim Defendant, v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendant and

Counterclaimant.

Case No. 08-5722RJB.

United States District Court, W.D. Washington, at Tacoma.

July 7, 2010

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ROBERT BRYAN, District Judge

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment on Liability Re: Coal Tar Contamination (Dkt. 80). The Court has considered the motion, responses, and the relevant documents herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a CERCLA suit brought by the United States against the Washington State Department of Transportation ("WSDOT") to recover costs incurred in responding to releases of hazardous substances into the Thea Foss and Wheeler Osgood Waterways ("Waterways"), which are within the Commencement Bay/Nearshore Tidelands Superfund site ("CB/NT Superfund site" or "CB/NT"). Dkt. 80, p. 6-9. Defendant WSDOT is alleged to own or operate parcels of land ("Tacoma Spur Property") near the Waterways and within the CB/NT Superfund site. Dkt.

80, p. 9-11, Dkt. 86, p. 5-6. On the Tacoma Spur Property, WSDOT built South A Street to connect downtown Tacoma with Dock Street and the waterfront. Dkt. 86, p. 2. WSDOT encountered a high water table during the construction of South A Street and built a "French drain system" to protect the roadway from water damage. *Id.* The French drain system connected to the street's stormwater drain, which then connected with the City of Tacoma storm sewer system. *Id.* The City of Tacoma storm sewer system eventually drains into the Thea Foss Waterway through the "West Twin" drain at the head of the waterway. *Id.*

WSDOT alleges that the Washington State Department of Ecology discovered that coal tar had migrated through the soil into the French drain system and into a catch basin. Dkt. 86, p. 3. The United States alleges that the drainage system installed by WSDOT acted as a pathway for coal tar to be funneled into the Thea Foss Waterway, thus contaminating the Waterways. Dkt. 80, p. 7.

On December 2, 2008, the United States filed this suit seeking recovery of response costs incurred in the cleanup of the Waterways under CERCLA. Dkt. 1. On May 27, 2010, the United States filed this motion for partial summary judgment regarding coal tar contamination. Dkt. 80. The United States is seeking judgment as to liability for coal tar contamination under CERCLA. *Id.*

II. DISCUSSION

A. LEGAL STANDARDS

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. **56**(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the

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burden of proof. *Celotex Corp. v. Catrett*, **477 U.S. 317**, **323** (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, **475 U.S. 574**, **586** (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. **56**(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, **809 F.2d 626**, **630** (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial — e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, **809 F.2d at 630**. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, **809 F.2d at 630** (relying on *Anderson, supra)*. Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, **497 U.S. 871**, **888-89** (1990).

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), **42 U.S.C. § 9601** *et seq.*, was enacted to facilitate "expeditious and efficient cleanup of hazardous waste sites." *Carson Harbor Village, Ltd. v. Unocal Corp.*, **270 F.3d 863**, **880** (9th Cir. 2001). Its secondary purpose is to hold responsible parties accountable for cleanup efforts. *Id.* CERCLA accomplishes these goals by imposing strict liability on owners

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and operators of facilities where releases of hazardous substances occur. *Id.* at 870. This liability is joint and several, subject to statutory defenses set forth in **42 U.S.C. § 9607**(b). *See California v. Montrose Chemical Corp. of California*, **104 F.3d 1507**, **1518** n. 9 (9th Cir. 1997).

To recover its costs for engaging in response actions, the EPA must prove: (1) the site at which the actual or threatened release of hazardous substances occurred constitutes a "facility" under **42 U.S.C. § 9601**(9); (2) there was a "release" or "threatened release" of a hazardous substance; (3) the party is within one of the four classes of persons subject to liability under **42 U.S.C. § 9607**(a) [CERCLA section 107(a)]; and (4) the EPA incurred response costs in responding to the actual or threatened release. *U.S. v. Chapman*, **146 F.3d 1166**, **1169** (9th Cir. 1998); United States v. Northeastern Pharmaceutical & Chemical Co., Inc., **810 F.2d 726**, **743** (8th Cir. 1986) ("NEPACCO"); **42 U.S.C. § 9607**(a)(4)(A) (defendants may be held liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan"). A party may be

a potential responsible party under CERCLA section 107(a) if they fall under one of four categories: current owner and operator — section 107(a)(1); former owner or operator — section 107(a)(2); arranger — section 107(a)(3); or transporter — section 107(a)(4). 42 U.S.C. § 107(a). The United States is arguing that WSDOT is liable under section 107(a)(1) or (2), but is reserving any other theories of liability (i.e. liability under sections 107(a)(3) & (4)). Dkt 80, p. 18 n. 3.

B. OWNER/OPERATOR LIABILITY

Under CERCLA section 107(a)(1), a party may be liable if it is the owner and operator of a vessel or a facility. **42 U.S.C. § 9607**(a)(1). The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. **42 U.S.C. § 9601**(9). Additionally, a party may be liable if at the time of disposal of any hazardous

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substance it owned or operated any facility at which such hazardous substances were disposed of. **42 U.S.C. § 9601**(a)(2).

Plaintiff argues that WSDOT has admitted the first three elements in its answer and discovery responses, and that the fourth element is established by undisputed factual evidence that WSDOT is the current owner of the Tacoma Spur property. Dkt. 80, p. 19. Plaintiff also states that there is undisputed factual evidence that establishes that WSDOT was the owner and operator of that property and of the DA-1 drainage system**[fn1]** at the time that system disposed hazardous substances into the Waterway. *Id.* Therefore, Plaintiff contends, the Defendant is liable under CERCLA Section 107(a) as the current owner of contaminated property and as the owner and operator of that property at the time of discharge. Dkt. 80, p. 18.

Defendant responds by asserting that it is not the owner or operator of the facility at the time the United State incurred costs. Dkt. 86, p. 5. Defendant asserts that the clean up by the United States involved the Thea Foss Waterway, not the Tacoma Spur Property, where no response costs were incurred, and that the Tacoma Spur Property is not the subject of the suit. Dkt. 86, p. 5-10. Defendant next argues that even if the highway property were a facility, WSDOT is not the owner of that property; the State of Washington is the owner. Dkt. 86, p. 11. Finally, the Defendant asserts that operation of the French drain for the purpose of removing groundwater does not make WSDOT an operator under CERCLA. *Id.*

This motion regarding the issue of liability appears to partly turn on the scope of the word "facility." Under CERCLA Section 107(a)(1), the owner and operator of a vessel or a facility is a liable party. Under CERCLA Section 107(a)(2), any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous

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substances were disposed of is potentially responsible. Plaintiff contends that "ownership of one portion of a `facility' — whose boundaries are defined by the extent of contamination, not by property lines — is sufficient to establish liability for response costs at that facility as a whole." Dkt. 80, p. 19. Plaintiff argues, in essence, that the entire CB/NT Superfund site is a facility and that Defendant owns property within that Superfund site. *See Id.* Defendant asserts the opposite argument; that the CB/NT Superfund site is not a facility for purposes of this action, the facility at issue is the Thea Foss and Wheeler Osgood Waterway, which is not owned nor operated by the Defendant. Dkt. 86, p. 9-11.

While there is no directly relevant case law in the Ninth

Circuit, the case of *U.S. v. Township of Brighton*, **153 F.3d 307** (6th Cir. 1998), is particularly instructive. The *Brighton* case involved a 15 acre plot in Brighton Township. *Brighton*, **153 F.3d at 310**. The land was owned by Vaughan Collett, and later by Jack Collett. *Id.* The Township of Brighton contracted with Vaughan Collett to use his land as a dump for the town's residents. Specifically, three acres in the southwest corner of the property were used as the township dump. *Id.* In 1994, the United States brought suit against both the township and Jack Collett to recover response costs under CERCLA after clean up of hazardous waste on the Collett property. *Brighton*, **153 F.3d at 312**. The district court found that Collett and the township were jointly and severally liable for the full amount of the response costs. *Id.* The township appealed the decision and argued that the Brighton Township dump comprised only three acres in the southwest corner of the 15 acres Collett property. *Id.* Therefore, the township argued, the government should have defined the bounds of the site in a way that excluded the township dump, which did not contain hazardous waste. *Id.*

The *Brighton* court noted that CERCLA defines the term "facility" as "any site or area where hazardous substances has been deposited, stored, disposed of, or placed, or otherwise

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come to be located." *Brighton*, **153 F.3d at 312** (*citing* **42 U.S.C. § 9601**(9)(B)). The *Brighton* court stated that:

> [their] task is to determine how broadly or narrowly the bounds of the "site" may be drawn. At one extreme, the entire Collett property (or the entire county for that matter), could be defined as a facility based on the presence of a hazardous substance in one portion of it. At the other extreme, the facility could be defined with such precision as to include only those specific cubic centimeters of Collett's property where hazardous substance were deposited or eventually found. The first approach obviously would sweep too broadly, the second too narrowly.

Brighton, **153 F.3d at 312**. The court stated that the "words of the statute suggest that the bounds of a facility should be defined at least in part by the bounds of the contamination." *Brighton*, **153 F.3d at 313**. However, the court stated, "an area that cannot be reasonably or naturally divided into multiple parts or functional units should be defined as a single `facility,' even if it contains parts that are non-contaminated." *Id.* The *Brighton* court concluded that the entire Collett property was one facility because Collett used the entire property as a dump. *Id.* The *Brighton* court supported this conclusion by stating that the facts show that local household and commercial dumping was largely, but not completely, limited to the southwest corner of the property; that refuse was moved around on the property; and that Collett placed materials from non-residents and industries in other parts of the site. *Id.* Finally, the *Brighton* court noted that "[i]f the township was only connected to the southwest corner, the appropriate place to draw that distinction is in the divisibility analysis [of CERCLA], not in the bounding of the facility." *Id.*

In this case, the United States defines facility as encompassing the entire CB/NT Superfund site, while WSDOT defines facility as either the Waterway or the Tacoma Spur Property. The United States' asserted definition of facility is too broad. If the Court was to adopt the United States' definition of facility, then liability could be imposed broadly and on persons not reasonably related to the contamination. In other words, a property owner whose property does not contain hazardous substance but is within such a "facility" could be found to

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be an owner of the facility and thus liable under CERCLA for

response costs. CERCLA was not intended to place the cost of clean up on persons who are not responsible for the contamination. *See U.S. v. Bestfoods*, **524 U.S. 51**, **56** (1998) ("those *actually* responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions.")

Under CERCLA, facility means any building, structure, installation, equipment, pipe or pipeline, or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." **42 U.S.C. § 9601**(9)(A) & (B). Under the plain meaning of the statutory provision, both the Waterways and the Tacoma Spur Property could be considered facilities since hazardous substances are located at both sites. However, that does not mean the two sites combine into one site to form a single facility. In the *Brighton* case, the site at issue was owned by one person, Jack Collett. Moreover, the *Brighton* court found that the entire site was used for a common purpose, a dump. In this case, the CB/NT Superfund site appears to include the properties of several different owners, including WSDOT, and there appears to be no common purpose among the different owners. Excluding other properties and focusing on only the Waterways and the Tacoma Spur Property, it still appears that there are different owners and different purposes. Moreover, the Waterways and the Tacoma Spur Property are reasonably or naturally divided into multiple parts or functional units. For these reasons, the Waterways and the Tacoma Spur Property should be considered separate facilities.

Since they are separate facilities, the next step is to determine which facility might impose liability on the Defendant. It has not been argued nor evidence presented that WSDOT owns or operates the Waterways. Even if the Court assumes that WSDOT does own and operate the Tacoma Spur Property, it does not necessarily mean that it is liable as an owner or operator of a facility under CERCLA. The United States incurred response costs here in the Waterway,

but not on the Tacoma Spur Property. The United States has not argued nor asserted that it has incurred response costs on the Tacoma Spur Property.

The law is unclear as to whether CERCLA requires that the response costs be incurred on the property owned or operated by a defendant, but CERCLA's purpose is to assign the cost of remediation to the party actually responsible for any damage, environmental harm, or injury. *See Burlington Northern and Santa Fe Ry. Co. v. United States*, **129 S.Ct. 1870**, **1874** (2009) ("The Act was designed to promote the `timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination"); *U.S. v. Bestfoods*, **524 U.S. 51**, **56** (1998) ("those *actually* responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions."). CERCLA provides for liability to attach in four ways; current owner and operator, former owner or operator, arranger, and transporter. **42 U.S.C. § 9607**(a). CERCLA section 107(a)(1) states that the owner and operator of a facility is liable for response costs. *Id.* A facility is any building, structure, installation, equipment, pipe or pipeline . . . or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. **42 U.S.C. § 9601**(9). If the Court was to take the view that response costs need not be incurred on the facility owned and operated by the defendant, then liability may be imposed on persons not related to the contamination, which is not the purpose of CERCLA. Under a broad reading of the requirements of CERCLA as is advocated by the Plaintiff, a person owning and operating a building close to the clean up site (i.e. the Waterways) may be considered an owner and operator of a facility under CERCLA whether or not that person was responsible

for contamination of the clean up site. The Court believes that this is not what CERCLA intended. The Court believes a better interpretation of the requirements of CERCLA is that for liability to attach to WSDOT under CERCLA section 107(a)(1), it must be the owner or operator of the facility in which the

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United States incurred a response cost. To allow otherwise would expose a party to liability under CERCLA for merely holding property that fit the definition of facility whether or not that party had any actual responsibility in contamination. While this interpretation of CERCLA section 107(a)(1) may seem narrow, it carries out the purpose of CERCLA by allowing liability to attach to persons who dispose of hazardous materials into the environment under CERCLA section 107(a)(3) or (4), but allows persons not responsible for contamination to be free of liability. In this case, WSDOT is not the owner or operator of the Waterways, and there were no response costs incurred on the WSDOT owned Tacoma Spur Property. Therefore, the United States' motion for summary judgment as to the CERCLA section 107(a)(1) should be denied.

The foregoing analysis also applies to CERCLA section 107(a)(2) former owner or operator liability.

Futhermore, the hazardous substance in this motion is coal tar and the facility is the Tacoma Spur Property. It is undisputed that coal tar was disposed of at the Tacoma Spur Property. However, the United States argues that the coal tar contaminated the Waterways through the drainage systems installed at the Tacoma Spur Property. Dkt. 80, p. 21-22. WSDOT contends that Waterways contamination is not due to the coal tar being disposed of through the drainage system. Instead, WSDOT argues that contamination resulted from urban stormwater runoff. Dkt. 86, p. 20. There appears to be a genuine issue of material fact as to whether coal tar was disposed of which resulted in removal and remedial actions costs. As such, the United States' motion for summary judgment as to CERCLA section 107(a)(2) should be denied.

For the foregoing reasons, the Plaintiff's motion for partial summary judgment as to liability under CERCLA sections 107(a)(1) & (2) should be denied. Since summary judgment as to liability under CERCLA sections 107(a)(1) & (2) is denied, the Court declines to address the arguments regarding affirmative defenses.

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C. NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL

The United States contends that WSDOT has fully litigated its liability in connection with the Tacoma Spur Property and drainage system in Washington State Superior Court and lost. Dkt. 80, p. 26. The United States argues that under the doctrine of "issue preclusion," the state's court's judgment and finding of fact and law are conclusive against WSDOT. *Id.* The United States specifically cites *Pacificorp Envtl. Remediation Co. v. WSDOT*, No. 07-2-10404-1 (Wash. Super. Ct. April 30, 2009) to support its argument that the issue of liability is precluded in this litigation. Dkt. 27, p. 27. WSDOT responds by arguing that judgment regarding a state law does not apply to a federal issue, and that federal law regarding collateral estoppel applies, not state law. Dkt. 86, p. 12-20.

Nonmutual offensive collateral estoppel is estoppel asserted by a nonparty to an earlier action to prevent a defendant from relitigating an issue previously decided against the defendant. *Parklane Hosiery Co., Inc. v. Shore*, **439 U.S. 322**, **326-332** (1979). Trial courts are given broad discretion to determine when collateral estoppel should be applied. *Id.* at 331. "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge

should not allow the use of offensive collateral estoppel." *Id.* The *Parklane* court stated that application of offensive collateral estoppel may be unfair if: (1) the first action was for small or nominal damages and that future suits are not foreseeable; (2) the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; or (3) the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. *Id.* at 330-31. Finally, the *Parklane* court notes that the defendant must have had a full and fair opportunity to litigate. *Id.* at 328.

In this case, it would be unfair to the Defendant for the Court to apply offensive estoppel.

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In the Superior court case, the issue was whether the Defendant violated the Model Toxics Control Act ("MTCA") RCW **70.105D**, et seq., not whether it violated CERCLA. The United States has admitted that the MTCA was "heavily patterned" after CERCLA, but it is not identical to CERCLA. *See* Dkt. 80, p. 27 n. 9. Therefore, the issues presented in this case may be different from the Superior court case. Moreover, there are defenses or exemptions in CERCLA that are not found in the MTCA. It would be unjust not to allow the Defendant to avail itself of these defenses. Finally, WSDOT has not had the opportunity to fully and fairly litigate the CERCLA claims. The Superior court case only litigated MTCA claims. For the foregoing reasons, nonmutual offensive collateral estoppel should not be applied in this case and the Plaintiff's motion for partial summary judgment should be denied.

III. ORDER

The Court does hereby find and **ORDER**:

(1) Plaintiff's Motion for Partial Summary Judgment on Liability Re: Coal Tar Contamination (Dkt. 80) is **DENIED** only insofar as the motion was based on CERCLA section 107(a)(1) & (2); and

(2) The Clerk is directed to send copies of this Order to all counsel of record and any party appearing *pro se* at said party's last known address.

DATED this 7th day of July, 2010.

[fn1] The Plaintiff uses the nomenclature "DA-1 drainage system" in its filings. The Court will use the nomenclature "Tacoma Spur Property" generically to refer to both the drainage system and above ground structures.

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EXHIBIT 3

Preliminary Site Perimeter

RI Sediment Station, May 2010

TCRA Soil Station, August 2010

0 500

Scale in Feet

FEATURE SOURCES:
Aerial Imagery: 0.5-meter January 2009 DOQQs - Texas Strategic Mapping Program (StratMap), TNIS

Figure 1
2,3,7,8-TCDD (ng/kg dw) in Sediments Collected for the RI, and in Soil Collected for the TCRA SJRWP Superfund/MIMC and IPC